



**DAPLEX PLUMBING & HEATING LTD.** )

*(Defendant) Appellant* )

- and - )

**RED RIVER CONSTRUCTION COMPANY  
LIMITED and HYMAN DASHEVSKY** )

*(Defendants) Respondents* )

- and )

**NEWKLAS CONSTRUCTION CANADA  
LTD. and NUMBER TEN  
ARCHITECTURAL GROUP** )

*(Defendants)* )

Docket No. AI 98-30-03826 )

**B E T W E E N:** )

**FOYER VALADE INC.** )

*(Plaintiff) Respondent* )

- and - )

**HYMAN DASHEVSKY** )

*(Defendant) Appellant* )

- and - )

**RED RIVER CONSTRUCTION COMPANY  
LIMITED, NEWKLAS CONSTRUCTION  
CANADA LTD., DAPLEX PLUMBING &  
HEATING LTD. and NUMBER TEN  
ARCHITECTURAL GROUP** )

*(Defendants)* )

**HUBAND J.A.**

1           The plaintiff, Foyer Valade Inc. (Foyer Valade), operates a care  
home for the aged. On April 16, 1993, a water line servicing the sprinkler  
system separated in the area of the crawl space. Water accumulated in  
large quantities in the basement area of the building, causing damage to  
Foyer Valade in the agreed-upon sum of \$575,000.

2           An action was commenced by Foyer Valade on October 7,  
1993, naming six defendants and alleging that the cause of the separation  
of the water line was a defective installation when the building was being  
constructed in 1987. The defendants were Newklas Construction Canada  
Ltd. (Newklas) as the general contractor, Daplex Plumbing & Heating Ltd.  
(Daplex) as the subcontractor in charge of the mechanical works, including  
plumbing, Red River Construction Company Limited (Red River) as the  
sub-subcontractor in charge of exterior plumbing, Number Ten  
Architectural Group (Number Ten) as the project architect, Hyman  
Dashevsky (Dashevsky) as the engineering consultant retained by Number  
Ten, and The City of Winnipeg.

3           Newklas did not attempt to defend the action against it. By the  
time of trial, Newklas had ceased to exist as a legal entity and had no  
insurance coverage available to honour a claim by Foyer Valade.

4           The claim against The City of Winnipeg was abandoned prior to  
trial.

5           The action against Number Ten was based upon its contract with Foyer Valade to provide an appropriate design and periodic inspection during the construction. Number Ten sought indemnity from Dashevsky since any contractual failure was in the area of design or inspection of mechanical works. However, Foyer Valade also sued Dashevsky directly, presumably based upon the tort of negligence.

6           I use the word “presumably” because the statement of claim does not clearly define the nature of the claim against the individual defendants. There is a general averment that the defendants failed to meet their obligations to Foyer Valade “either in contract, at law or by statute.” The lack of precision in the pleadings of Foyer Valade was not entirely cured by the defendants’ pleadings.

7           The action against both Daplex and Red River also sounds in tort since there was no contractual link between Foyer Valade and those defendants.

8           In addition to their respective statements of defence denying liability, Dashevsky claimed indemnity against all co-defendants, as did Red River, and as did Daplex.

9           The learned trial judge did indeed find that the installation was defective. Number Ten was found liable for breach of contract for its failure to “conduct inspections at intervals appropriate to the stage of construction” and failing to protect Foyer Valade against defects and deficiencies in the contractor’s work. However, since Number Ten had

retained Dashevsky as mechanical engineer to provide these services, Number Ten was entitled to full indemnification as against Dashevsky. There is no appeal from that disposition.

10           The learned trial judge found Daplex, Red River, and Dashevsky all liable in tort. The installation by Red River was found to have been negligently made. The negligence of Daplex was in failing to monitor what Red River had done. The trial judge concluded that Dashevsky's failure to inspect sounded in tort as well as contract. The trial judge held Daplex, Red River, and Dashevsky to be jointly and severally negligent. Finally, he allowed Dashevsky's claim for indemnification as against Daplex and Red River.

11           On this appeal, Dashevsky contends that he met his obligations both in contract or otherwise with respect to inspections and should not share in the liability. Daplex contends that it had no responsibility to supervise or monitor its subcontractor, Red River, and therefore should not be held liable. It also appeals the ruling that Dashevsky is entitled to indemnification from Daplex. Red River's appeal ultimately came down to two points: that Dashevsky is not entitled to indemnification against Red River, and that as between Dashevsky and Red River, the greater proportion of liability should rest with Dashevsky.

12           To put this litigation in proper context, I return to a description of the installation itself. Before any building was in place, Red River was to install a six-inch water line from The City of Winnipeg water-main to the building site. The plastic service pipe was in an underground trench

which would pass under the outer wall of the intended structure. There was then a 90-degree elbow, causing the water line to rise vertically above grade, where the pipe was capped. At a later date, when construction of the building was sufficiently advanced, Daplex, as the inside mechanical contractor, removed the cap and attached its galvanized steel water pipes to the installation in order to service the sprinkler system in the building.

13           The water line installed by Red River was under pressure, and consequently, the cap was secured in place in this manner: the elbow, where the pipe made its vertical rise, was encased in concrete called a thrust block. Two restraining rods were buried in the concrete and rose vertically, one on either side of the water pipe, to be bolted to the cap at the terminus of Red River's installation. When Daplex made its connection, the cap was removed and the Daplex piping was attached to those same restraining rods.

14           The immediate cause of the failure of the installation some years later was because the restraining rods had corroded through, allowing the pipe to detach or separate at the point of the elbow buried in the ground under the crawl space. This corrosion took place because the soil contained corrosive elements which affected the steel rods. At the time Red River installed the water line, it was known that the soil was corrosive and it was also known that there were various ways to protect against the kind of failure which developed. The steel rods could have been coated with an asphalt material, stainless steel rods could have been used rather than ordinary steel restraining rods, or the installation could have been

encased in a cylinder, which would have thus separated the restraining rods from the soil. Red River employed none of these safeguards and Dashevsky's inspections did not reveal the potential hazard.

15           At the appeal hearing, and in the early stages of argument, the task of this Court was made easier by certain concessions made by counsel for Red River and counsel for Dashevsky. Red River conceded that if its conduct was in violation of its contractual obligations as a subcontractor to Daplex, that same conduct would also constitute negligence on its part, giving rise to tortious liability. Counsel for Dashevsky conceded that aside from contract, Dashevsky had a duty to inspect, and a failure in that duty would result in tortious liability.

16           I do not find it needful to provide a detailed explanation as to why Red River and Dashevsky should be held liable in negligence given the concessions referred to. The trial judge came to that conclusion, and it is amply supported by the evidence. It is enough to say that Red River was aware that the soil was highly corrosive and that the contract documents required Red River to provide appropriate protection to the restraining rods in those circumstances. It failed to do so. Concerning Dashevsky, an inspection of the installation would have and should have revealed its inadequacies. While it is true that the contract documents do not require every aspect of the work to be inspected, there is an added responsibility with respect to critical areas of the work. This was such an area. Even if it was not possible or practical to view the installation before it was

back-filled, simple inquiry of Red River would have revealed the inadequacy of the installation.

17           The finding that Daplex was also liable in negligence is a different matter. The trial judge held Daplex failed in a duty to monitor the work of its subcontractor, Red River. It was suggested that the duty arose or was accentuated by reason of the fact that the installation was inside the perimeter walls of the building and was normally the work of the inside, rather than the outside, mechanical contractor.

18           With deference, the evidence seems overwhelming that the installation which failed is normally the work of the outside contractor. It is to be remembered that when the water line was installed and back-filled by Red River, there was as yet no building in place. There was simply a capped water pipe sticking out of the ground, around which a building was subsequently constructed. This was outside work. More importantly, I agree with the submission of counsel for Daplex that whether the work is normally performed by the inside or outside mechanical contractor is a red herring because, in any event, there is no duty to monitor or supervise that part of the work which has been subcontracted. The monitoring responsibility rests with the owner's consulting architect or engineer.

19           The general rule is that a party who retains the services of an independent contractor is not legally responsible for the wrongs of the independent contractor or its employees during the course of the work for which it was engaged. There are no contractual provisions that would



displace the operation of this general rule. I would therefore allow the Daplex appeal and hold Daplex blameless.

20           Since the liability of both Dashevsky and Red River can be framed in tort, an allocation of responsibility can be made between them under the terms of *The Tortfeasors and Contributory Negligence Act*, R.S.M. 1987, c. T90.

21           I am of the view that the larger share of the blame rests with Red River. I would ascribe 75 per cent of the fault to Red River and 25 per cent to Dashevsky.

22           I see no basis for granting Dashevsky a right of indemnity as against Red River. The liability of Dashevsky arises from his own acts or omissions, which contributed to the subsequent failure of the installation. Red River did nothing that caused or contributed to Dashevsky's failure to inspect. There was no contract between them providing Dashevsky with a right of indemnity. There is no reason why each wrongdoer should not be responsible for his or its negligent conduct.

23           While this case has been determined on the basis of tortious liability, it must be recognized that the judgment as entered after trial, and from which no appeal has been taken, also holds Number Ten responsible in contract, with a right of indemnity as against Dashevsky.

24           On this appeal, Foyer Valade, having maintained its judgment, is entitled to one set of costs against Red River and Dashevsky, to be allocated on a 75/25 basis. Daplex is entitled to costs against Foyer

Valade, for which Foyer Valade is entitled to indemnity from Red River and Dashevsky, allocated in the same manner. Daplex will also be entitled to costs in the Court of Queen's Bench against Foyer Valade, for which it will be entitled to indemnity from Red River and Dashevsky, divided on a 75/25 basis.

Chas R. Hill J.A.

I agree: J. Kentwell J.A.

I agree: J. Ryan J.A.